

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
SILVA, : 20-cv-00756-ARR-PK
Plaintiff, :
 :
- versus - : U.S. Courthouse
 : Brooklyn, New York
 :
 :
HORNELL BREWING CO., INC., :
et al. : December 3, 2020
Defendants : 2:34 PM
-----X

TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY CONFERENCE
BEFORE THE HONORABLE PEGGY M. KUO
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:
(TELEPHONICALLY)

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1 THE COURT: Civil Cause for Discovery
2 Conference by Telephone in the matter of Christopher
3 Silva v. Hornell Brewing Company, Inc., et al, docket
4 number 20-cv-756. Magistrate Judge Peggy Kuo presiding.

5 Will the parties please state their
6 appearances, starting with plaintiff?

7 MR. FRANCIS: Good afternoon, your Honor.

8 For plaintiff, this is Jeremy Francis with the
9 Sultzer Law Group, S-U-L-T-Z-E-R.

10 MR. WOLFSON: Good afternoon, your Honor.

11 This is Howard Wolfson from Morrison Cohen for
12 the defendants.

13 MS. POLLACK: Good afternoon, your Honor.

14 This is Gayle Pollack, also from Morrison Cohen
15 for the defendants.

16 THE COURT: All right. Good afternoon,
17 everyone.

18 I received a letter that was filed at docket
19 number 37 that raises discovery disputes that both sides
20 have with the other's responses. This was filed now, was
21 dated November 20th, so I will turn to each one in turn.
22 I'll start with the plaintiff's requests that there be --
23 well, I guess I will call it a motion to compel
24 responses, and then I'll return to the defendants' motion
25 to compel. Given that it's been over a week since this

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1 was filed, if there are any updates, please fill me in on
2 that, as well.

3 So Mr. Francis, why don't you start? Tell me
4 what exactly is still missing, and why you're entitled to
5 that information or those documents.

6 MR. FRANCIS: Certainly. Thank you, your
7 Honor. I think from plaintiff's perspective, the short
8 answer is not much, if anything, has changed since the
9 submission of the letter, probably true for defendants,
10 as well.

11 Plaintiffs have not received any documents in
12 this case, nor has there been an agreement on a date to
13 exchange documents. I've -- as you can see from the
14 letter, I've broken down the categories of documents and
15 information that the plaintiffs believe -- plaintiff
16 believes he is entitled to. I can go through those if
17 you like, and each of the interrogatories and document
18 requests that would correspond to those broad categories.

19 You know, I don't want to belabor the point as
20 a lot of this is already set forth in the letter, but I'm
21 happy to go through it categorically if that's what you
22 would like.

23 THE COURT: Well, I'm trying to figure out the
24 best way to resolve these issues for you. So I see that
25 you're asking for information related to document --

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1 related to other products sold by defendants, but I don't
2 know why that's relevant.

3 MR. FRANCIS: Yes.

4 THE COURT: So if you could just go through it
5 and tell me.

6 MR. FRANCIS: Sure. Sure. Absolutely. Yes,
7 there are a few interrogatories, as well as document
8 requests related to other products sold by the defendant.
9 I think during our meet and confers, plaintiff agreed to
10 limit those requests to other products that defendant
11 sells that are labeled as "natural" or "all natural" or
12 any derivation thereof, as well as other what we'll call
13 "gummy" products sold by the defendants. This is a case
14 involving chewable gummies.

15 And the reason that those documents and that
16 information is relevant is for a damages analysis in this
17 case, specifically a price premium analysis. The best
18 and most direct way to do a price premium analysis is to
19 have appropriate comparable products.

20 So to the extent that defendant sells other
21 gummy products, other similar gummy products that are not
22 labeled as natural or all natural, or other products that
23 are not gummies that are so-labeled, that is relevant --
24 it's directly relevant to plaintiffs being able to
25 conduct such a price premium analysis.

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1 And I mean, moving forward through the letter
2 that we've sent, we've also asked --

3 THE COURT: Well, okay --

4 MR. FRANCIS: -- for -- sure.

5 THE COURT: So maybe, Mr. Francis, maybe the
6 best way to handle it is you --

7 MR. FRANCIS: You want me to stop?

8 THE COURT: -- (audio interference) these three
9 categories --

10 MR. FRANCIS: Yeah.

11 THE COURT: Well, these three categories relate
12 to the premium, right?

13 MR. FRANCIS: When you say "three categories"?

14 THE COURT: With the information about other
15 products -- well, I'm looking at your filling --

16 MR. FRANCIS: Sure.

17 THE COURT: -- it says documents related to
18 other products --

19 MR. FRANCIS: Right.

20 THE COURT: -- sales data for those products,
21 and then document related to how defendants determine
22 pricing. So that is --

23 MR. FRANCIS: That's right.

24 THE COURT: -- the price premium -- the
25 premium.

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1 MR. FRANCIS: That's absolutely right.

2 THE COURT: All right. Okay.

3 MR. FRANCIS: Each of those categories --

4 THE COURT: So those are --

5 MR. FRANCIS: -- relate to --

6 THE COURT: -- the price premium damages.

7 MR. FRANCIS: Correct.

8 THE COURT: So then let's talk about what
9 defendant has to say about those.

10 MR. FRANCIS: I'd also, just before you do so,
11 I'd also lump into that category, interrogatory number
12 11, which has to do with the identity of the retailers.
13 That is something that is necessary to us to determine
14 pricing of the products. To the extent that defendants
15 don't have the retail pricing, and again, that would be
16 relevant to doing a damages and price premium analysis.

17 THE COURT: Okay. Is there anything else --
18 any other -- are there any other categories that fit into
19 this premium damages' argument?

20 MR. FRANCIS: I don't believe so, your Honor,
21 no. That conversation --

22 MR. FRANCIS: Okay. so why don't we take that
23 first? Mr. Wolfson or Ms. Pollack?

24 MR. WOLFSON: Thank you, your Honor.

25 First, let me just say Mr. Francis said that

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1 they received no documents. We haven't received any
2 documents either, so you know, neither side has produced
3 documents, and it's obvious why, because we have
4 disputes. So I just don't want you to think that there's
5 been some one-way discovery here.

6 THE COURT: I don't think --

7 MR. WOLFSON: (Audio interference) to the --

8 THE COURT: -- there is one-way discovery. I
9 think the problem is --

10 MR. WOLFSON: Yes.

11 THE COURT: -- that there's no discovery and
12 that in itself is a problem. So --

13 MR. WOLFSON: Yeah.

14 THE COURT: -- I wouldn't --

15 MR. WOLFSON: I understand that.

16 THE COURT: -- rest on that being a positive
17 thing, so --

18 MR. WOLFSON: Yeah. So let me turn to the
19 specific issue because I think this illustrates what the
20 problem is with discovery. My client, Arizona Iced Tea,
21 makes literally hundreds of products, most of which are
22 beverage products. The iced tea, fruit drinks, Arnold
23 Palmer drinks, and other drinks you see in various
24 outlets.

25 The product at issue in this case is a, I guess

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1 you would call it a "fruit chew". It has nothing to do
2 with the beverage products. I think it's the only fruit
3 chew they make, though I am checking into that.

4 Just so you understand, your Honor, this is a
5 product that has very limited distribution anywhere in
6 the United States. So they've asked us in discovery for
7 all of our pricing, and other proprietary, confidential,
8 and irrelevant information about hundreds of beverage
9 products that are not the subject of any claim in this
10 action.

11 And if you look at their own complaint, their
12 price premium damage claim is, they say that because we
13 put all natural on the label for this fruit chew, that
14 they paid more for the fruit chew product, than they
15 would have paid for what they call -- this is the term in
16 the complaint -- "comparable" fruit chew products that
17 didn't use the term all natural.

18 So their damage analysis is whatever they paid
19 -- you know, whatever Mr. Silva allegedly paid for our
20 product, and I'll just \$1.50, and versus what he paid --
21 deduct what he paid for a comparable product, let's say
22 he paid \$1.40, so their damage calculation would be ten
23 cents per package.

24 You know, the damage or price premium analysis
25 has absolutely nothing to do with what Arizona charges

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1 for a 12 ounce can of iced tea, or a gallon container of
2 Arnold Palmer, or an 8 ounce bottle of water, or any of
3 those beverage products that aren't mentioned anywhere in
4 the complaint, and have absolutely nothing to do with the
5 claims that have been alleged. That is our position,
6 your Honor.

7 THE COURT: So -- all right. So what I am
8 hearing is if you're looking for information as to the
9 premium that was paid, that a consumer would pay for a
10 product, this fruit chew product, above what a non-all
11 natural fruit chew product would be, the way to get that
12 is not by comparison to pricing information related to
13 iced tea product.

14 MR. WOLFSON: That's correct, your Honor, and
15 as I said, we're talking about literally hundreds of
16 different iced tea fruit drinks and other products, in
17 all different sizes from a gallon down to 6 ounces.

18 THE COURT: Uh-hum.

19 MR. WOLFSON: The plaintiff's theory is I
20 could've bought -- and I'll just pick a name -- I
21 could've bought Welch's Fruit Chews that don't say all
22 natural for \$1.40, but instead, I bought your product for
23 \$1.50, and so the price premium was a dime. That's the
24 damages.

25 Now, I will also tell you although I don't want

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1 to jump too far ahead, we've asked them in discovery,
2 what is the comparable product that you allege in the
3 complaint you could have bought for less? And they've
4 not provided any answer for that, but they don't need
5 pricing about our gallon iced teas. Their damage claim
6 is based upon what Mr. Silva claims he paid for this, for
7 our product which he still hasn't told us, and --

8 THE COURT: Okay.

9 MR. WOLFSON: -- what he claims, he's either
10 paid in the past, or could have paid at that time for a
11 comparable product that wasn't labeled all natural.

12 THE COURT: Right. Okay.

13 MR. WOLFSON: Our other products --

14 THE COURT: So Mr. Francis --

15 MR. WOLFSON: -- could not be more utterly
16 irrelevant to this.

17 THE COURT: I hear you on that. You've said
18 that already. So Mr. Francis, why does the product
19 pricing for other products have anything to do with the
20 difference between what your client would've paid for an
21 all natural fruit chew, as opposed to a not all natural
22 fruit chew?

23 MR. FRANCIS: Well, I think we're talking about
24 two separate categories here. First of all, you know,
25 we've already stated that we've limited this request at

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1 this point through the meet and confer to other products
2 that are either other gummy fruit chew products that
3 Arizona produces, which they may not, as defendant
4 asserted there, in which case there would be nothing to
5 get there, as well as other products they produce that
6 have some iteration of the term natural.

7 THE COURT: Right.

8 MR. FRANCIS: So --

9 THE COURT: So that's the question. That is
10 exactly the question, Mr. Francis.

11 MR. FRANCIS: Right, understood.

12 THE COURT: Other products being primarily
13 drinks, so why does whether a natural fruit drink, how
14 that is priced, why does that matter?

15 MR. FRANCIS: The answer to that is because
16 while the most direct and relevant comparison at issue
17 here would be between a fruit chew labeled as natural,
18 and a fruit chew not labeled as natural.

19 There is also a sort of cross-check of sorts
20 that can be done between an Arizona product, say -- call
21 it an iced tea product that is labeled as natural, and
22 one that is labeled not all natural.

23 THE COURT: All right.

24 MR. FRANCIS: The pricing of those products if
25 it --

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1 THE COURT: I got it.

2 MR. FRANCIS: If Arizona is pricing an all
3 natural iced tea ten cents higher than it prices a non-
4 all natural iced tea, that is an indication that they
5 consider the natural representation to be valuable to the
6 consumer, which is directly relevant to this case.

7 THE COURT: Why does it matter what they think
8 is important? Isn't it a question of what your client
9 suffered because it's a damages.

10 MR. FRANCIS: It's an ultimate --

11 THE COURT: So if your --

12 MR. FRANCIS: That's right. I mean --

13 THE COURT: -- client is saying, okay -- if
14 your client says if I had known that this was not all
15 natural, I would not have paid the extra 10 cents or a
16 dollar, all right?

17 So the comparison there is between an all
18 natural product, and a non-all natural product, the same
19 thing, you can't -- unless he's saying, which is not what
20 he is saying, if I had known that there was some
21 difference, I wouldn't have bought a fruit chew, I would
22 have gotten an iced tea, right?

23 MR. FRANCIS: Right.

24 THE COURT: So that's not what he is saying.
25 So then these really are not relevant here at all.

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1 MR. FRANCIS: Well, I'm moving a little bit
2 beyond damages calculation here.

3 THE COURT: Um-hum.

4 MR. FRANCIS: The idea that they're going to
5 try to raise is a defense that they do not charge a
6 premium at all based on the word all natural, or that
7 consumers don't care, or simply won't pay more for
8 products that are all natural --

9 THE COURT: But that's information --

10 MR. FRANCIS: -- and their price --

11 THE COURT: -- that you can get on your --
12 yeah, that has nothing to do with what this company is
13 doing because I am sure that your argument is going to be
14 the market itself prices differently, and you will bring
15 in other examples. So whether there's -- and I mean, if
16 you have -- if this company makes a fruit chew or
17 comparable product that is not all natural, or not
18 labeled as such, you could get pricing for that, and then
19 if you found that that was priced lower, then you might
20 be able to say that it's different.

21 So that would be permissible, but not any other
22 product that's labeled all natural or not all natural
23 because you still don't have a -- you don't have a price
24 comparison because if all you're asking for is the
25 pricing information for everything labeled all natural,

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1 you still don't have the pricing information for the
2 products that are not all natural in order to do that
3 price comparison. So it doesn't make sense to me --

4 MR. FRANCIS: Under --

5 THE COURT: -- that you're seeking this.

6 MR. FRANCIS: No, understood. We have perhaps
7 given up too much in agreeing to limit ourselves to all
8 natural.

9 THE COURT: Right, yeah. But it --

10 MR. FRANCIS: So that has --

11 THE COURT: Yeah. So by doing that, what
12 you've done is indicated to me that the information
13 you're seeking is not what you have now claimed, and so I
14 don't think it's relevant here. So that request to
15 compel is denied.

16 So let's move onto your next category. Why
17 don't you tell me what that has to -- how the relevance
18 argument plays out there.

19 MR. FRANCIS: Sure. So I mean, I don't know if
20 we have -- if we've covered interrogatory number 11,
21 which is the identity of the retailers, again this --

22 THE COURT: Yes, I don't find that relevant.

23 MR. FRANCIS: Okay.

24 THE COURT: If there's a specific need for your
25 contacting those retailers for something that's relevant,

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1 maybe but at this point, you haven't laid out a basis.
2 All you've said is if the plaintiff don't have pricing
3 data for the product, it says here, pricing information
4 for the product, then you would try to get that from the
5 retailers, but I haven't seen or heard that the
6 defendants don't have pricing information for the
7 product.

8 MR. FRANCIS: Understood. So the next
9 category, a broad category, is the ingredients in the
10 products. We've asked for descriptions of the
11 manufacturing process of the ingredients, identities of
12 the manufacturers, descriptions of the -- documents
13 sufficient to identify the formulation in the product,
14 and changes in those formulations over time, and this is
15 sort of repetitive of the interrogatory, but documents
16 sufficient to identify manufacturers as well.

17 THE COURT: And why do you want this
18 information?

19 MR. FRANCIS: So again, this information, and I
20 believe we discussed this a little bit during the meet
21 and confer, but how these ingredients are processed,
22 whether or not these ingredients would be considered
23 synthetic to a reasonable consumer, which is at the heart
24 of this case. For some of these ingredients, at the very
25 least, will often depend on the manufacturing process.

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1 There are ingredients that can be derived naturally,
2 which a consumer may or may not consider synthetic, and
3 then there are ingredients that the same ingredient can
4 be industrially produced in a manner that we would argue
5 renders it synthetic in the eyes of a reasonable
6 consumer.

7 So the manufacturing process is important in
8 the ultimate question of the case, whether these
9 ingredients are synthetic. In order to determine how the
10 -- these are all questions designed to determine how
11 exactly these ingredients are processed -- are produced.

12 As far as the changes in the formulation, what
13 we're really looking for here are reasons for the changes
14 in these formulations. One can envision, not that this
15 happens often, but can envision an email or a memorandum
16 asking for a change to an ingredient, or the change in
17 the way an ingredient is produced to make it more or less
18 natural in ways -- you know, for example, if they decided
19 to change their labeling to all natural, they could send
20 an email to the manufacturer saying we want to produce it
21 in this way now, and that would be directly relevant to
22 whether that ingredient is in fact natural or synthetic.

23 THE COURT: All right. Mr. Wolfson?

24 MR. WOLFSON: What counsel just informed you or
25 described, is not what's alleged in the complaint. The

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1 complaint alleges that Mr. Silva on an unspecified date
2 purchased this product, and has the label that they
3 claim, and the ingredients are listed, and there are six
4 ingredients that they allege in the complaint, are in the
5 product, and that are allegedly synthetic and not
6 natural.

7 Whether the product had a different formulation
8 earlier when Mr. Silva didn't buy it, and whether it had
9 a different formulation later when Mr. Silva didn't buy
10 it, is just -- again, it's just irrelevant. He says,
11 "When I purchased the product, these are the ingredients
12 and they allegedly are synthetic."

13 So the changes, if any, before, or the changes
14 if any, after, are irrelevant.

15 Second, there are six different ingredients
16 that they say are allegedly synthetic, and what I don't
17 understand is are they now saying that there's a specific
18 one of those ingredients, or more than one, that
19 depending upon how it was manufactured, may actually be
20 all natural and not synthetic? And they may have made a
21 mistake when they alleged in the complaint that all of
22 those ingredients were synthetic.

23 Again, this is not the facts or the theory
24 that's alleged in the complaint. This sounds like it's
25 an attempt to rewrite the complaint because they realized

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1 that some of these ingredients must in fact not be
2 synthetic.

3 So again, it is not relevant to the claims that
4 they've asserted in the complaint -- and I should say the
5 amended complaint. You know, they had an opportunity to
6 amend, and this is just not the claims that are alleged.

7 THE COURT: So Mr. Francis, I'm looking at the
8 amended complaint, and the list of what you call
9 synthetic ingredients, and it seems to me your theory in
10 that amended complaint is that these ingredients are in
11 fact, not natural but synthetic, and so if you're
12 alleging that they are in fact synthetic, how they were
13 produced might be relevant to your argument about them
14 being synthetic rather than natural, but whether the
15 formulation changed over time, so that there was more
16 gelatin, for example, and less citric acid doesn't seem
17 to go to the issue that you've alleged.

18 And then, whether the -- who the manufacturers
19 were wouldn't matter either because I think Mr. Wilson
20 raises a good point, either you're saying that for some
21 manufacturers and their processes, these may be natural,
22 but for some, they would be synthetic. If that's the
23 case, that actually hurts your case, and I'm not really
24 sure why you're alleging that because on its face, the
25 complaint says gelatin is synthetic. You're not saying

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1 there's a naturally occurring version of gelatin which I
2 assume might be what defense is saying, but you're not
3 saying that, so I am not really sure why you're trying to
4 get --

5 MR. FRANCIS: Well, that's --

6 THE COURT: -- this information, unless you're
7 trying to defend against that defense, I don't know.

8 MR. FRANCIS: That's --

9 THE COURT: But the defense has been brought
10 up --

11 MR. FRANCIS: That's right.

12 THE COURT: Yeah.

13 MR. FRANCIS: That's right, your Honor.

14 THE COURT: All right. So --

15 MR. FRANCIS: It would be relevant to a defense
16 that the ingredients are, in fact, natural, right --

17 THE COURT: Okay.

18 MR. FRANCIS: -- which we --

19 THE COURT: So let me ask --

20 MR. FRANCIS: -- anticipate will happen here.

21 THE COURT: -- Mr. Wolfson. Yeah, let me ask
22 Mr. Wolfson if you are saying that, so is one of the
23 defenses that these ingredients are natural, and that
24 that might -- there would be a difference between a
25 synthetic and a natural ingredient based on how it's

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1 produced?

2 MR. WOLFSON: Well --

3 THE COURT: Because just based on my laymen's
4 understanding of ingredients, there may be -- gelatin may
5 well be naturally occurring, but if you isolate it and
6 put it into like a powdered form that you put in Jell-O,
7 then it may be not natural but I don't know. Maybe it
8 still is natural even though it's in powder form, rather
9 than, you know, a naturally occurring process where you
10 cook bones, and then when you put it in the refrigerator
11 it gels. So I'm not really sure what the situation is
12 here from the defendant's perspective.

13 MR. WOLFSON: Well, your Honor, I guess first
14 because none of this is alleged in the complaint,
15 including that these ingredients may be natural depending
16 upon how their manufactured, this is not something that
17 has been at issue yet or that frankly, I've taken a deep
18 dive on.

19 I will tell you, because you ask our position,
20 our position is that every one of the ingredients and the
21 product as a whole is -- that calling it or labeling it
22 all natural is not misleading.

23 THE COURT: Uh-hum.

24 MR. WOLFSON: Okay. It's not a specific
25 ingredient by ingredient defense that we have. Our

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1 position is that there's nothing misleading about calling
2 this product all natural, and so I don't think that the
3 manufacturing process, which again, none of it -- this is
4 is alleged in the complaint. There's nothing that
5 would've ever put us on notice until this moment that
6 their claim now depends not on what the ingredients are,
7 but how the ingredients -- not the product, each separate
8 ingredient, how each separate ingredient was
9 manufactured, and so --

10 THE COURT: And what I hear Mr. Francis saying
11 is that it's -- they're trying to pre-empt your defense,
12 and so they read into your answer, a defense that these
13 products are all natural, and that that could be based on
14 the manufacturing process, and so they're anticipating
15 perhaps how you're trying to prove your defense, that
16 they're natural, by showing that --

17 MR. WOLFSON: Well, I --

18 THE COURT: -- because of the process, they're
19 not natural anymore.

20 MR. WOLFSON: Yeah, I hear that too, your
21 Honor. I can only tell you that hasn't been alleged yet
22 in the case, it hasn't been an issue yet in the case. We
23 haven't gotten to expert discovery involving the
24 ingredients, and how any of them are made or
25 manufactured, and so I can't today tell you whether when

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1 we get to those issues, any of these six ingredients,
2 whether they're natural, or not natural, will be the --
3 based upon the manufacturing process. It seems to me if
4 that does become relevant at some point, that we can
5 revisit this issue.

6 THE COURT: Okay. So then what might make
7 sense is if this becomes the subject of further
8 exploration, perhaps through interrogatories or other
9 means, to find out if in fact that is a defense, and if
10 it turns out that is a defense, then there might be a
11 basis for requesting this particular information.

12 So Mr. Francis, you may have jumped a few steps
13 ahead of yourself. You may still be able to catch up, or
14 have everybody else catch up to you, but it may be too
15 soon to ask for this information if that defense, in
16 fact, is not being offered. All right?

17 MR. FRANCIS: Under --

18 THE COURT: And the answer doesn't give me
19 enough information to show that that is in fact a
20 defense, so you would need to explore it a little bit
21 further and get more details on that.

22 MR. FRANCIS: Understood, your Honor.

23 THE COURT: All right. So then the last piece
24 of your request was --

25 MR. FRANCIS: I think there are two --

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1 THE COURT: -- (audio interference).

2 MR. FRANCIS: -- yeah, two more --

3 THE COURT: Product (indiscernible)?

4 MR. FRANCIS: What's that?

5 THE COURT: I'm reading the last, you said
6 finally, defendant objects to interrogatory 12.

7 MR. FRANCIS: We may have jumped over, and let
8 me see the letter here, interrogatories 1, and 2, which
9 may -- yes, interrogatories 1 and 2, which are
10 defendants' definition of natural, as well as defendants'
11 understanding as to what a reasonable consumer believes
12 the term all natural means, and defendants have declined
13 to answer those interrogatories, I believe on the basis
14 that, you know, it doesn't matter what Arizona thinks,
15 and it doesn't matter what they think a reasonable
16 consumer thinks. Ultimately, what a reasonable consumer
17 thinks is the issue at trial.

18 Our position is what Arizona believes a
19 reasonable consumer thinks the term all natural means,
20 and how they define it themselves is directly relevant to
21 how a reasonable consumer thinks of the term all natural.
22 We plan -- we anticipate doing consumer surveys and
23 presenting expert evidence with regards to how consumers
24 interpret all natural, but certainly the company's own
25 definition and understanding of that is relevant, as

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1 well.

2 THE COURT: So the issue of all natural may
3 bear on the issue that we just talked about which is if
4 the defendant believes all natural can include certain
5 product -- certain ingredients, depending on their
6 manufacturing process, that might be an answer, or if
7 it's all natural because the ingredients are listed in
8 let's say FDA list of things that could be called all
9 natural, then that might be enough, so I think the first
10 part of the question might make sense, what the
11 definition is by the defendant itself.

12 The second one about what a reasonable consumer
13 thinks doesn't seem to be relevant because they are not
14 the arbiter of a reasonable consumer.

15 Mr. Wolfson, do you want to add anything to
16 that?

17 MR. WOLFSON: Yes, your Honor, thank you.

18 The first interrogatory says what is your
19 definition of the term all natural used on the label.
20 Now they've noticed depositions of three of our employees
21 including the chairman of the company, and you know, that
22 is certainly an appropriate question for them to ask the
23 witness at a deposition, although I might take the
24 position if we ever have a trial, that's irrelevant, but
25 certainly, you know, you can ask a witness.

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1 But to propound an interrogatory for us to give
2 some all-inclusive or uniform definition that would be
3 binding on every witness, I don't think that's a proper
4 use of an interrogatory. They've asked for the witnesses
5 who made the decision to use the all natural on the
6 label, and we're giving them those witnesses, and they
7 can ask that question at deposition.

8 THE COURT: Well, but for purposes of getting
9 information about the defendant, and here the defendant
10 is a corporation, so they're -- and the corporation made
11 a decision to put the label all natural on that product,
12 so I think it's a fair question even if there are
13 individuals who can answer the question, to find out the
14 official corporation position policy basis for using that
15 term on this product.

16 You're right, it is a proper topic for a
17 deposition but it doesn't make it an improper topic for
18 interrogatory to get a clear definition, or a simple
19 definition that is what the corporation was thinking when
20 this decision was made, and it will also assist in the
21 further discovery that we just talked about which is if
22 there is a definition that -- I can just, off the top of
23 my head, think of different ways this could go, right?
24 The answer could be we rely on a list of products or
25 ingredients that we're permitted to call all natural,

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1 because the government has told us to, a regulator has
2 said it's proper, or you can say we do investigations
3 into this, and these other criteria were used and among
4 the criteria could be manufacturing processes or maybe
5 not.

6 So you may rely on some in-house experts or
7 outside experts who tell you, that's fine, you can call
8 that natural because it's naturally occurring.

9 So you know, to get that information in
10 advance, I think will assist in the deposition because it
11 will enable there to be further document discovery if
12 necessary, so by the time everybody gets the deposition
13 it's pretty clear what is going on, and what further
14 questions and clarifications may be necessary.

15 So that first question about the defendants'
16 definition of all natural seems quite proper.

17 MR. WOLFSON: Can I just briefly just address
18 that --

19 THE COURT: Yeah.

20 MR. WOLFSON: -- and I certainly hear your
21 Honor. If what on earth the phrase all natural or
22 natural meant, you know, was clear, we wouldn't have any
23 of these litigations. Unfortunately, the FDA's so far
24 refused to clarify them. If you go online, and you
25 Google what is an all natural product, you'll find

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1 articles saying, you know, nobody really knows what the
2 heck it means.

3 THE COURT: It --

4 MR. WOLFSON: This interrogatory question,
5 "What is your definition of the term all natural" pre-
6 supposes that the company has a company uniform
7 definition of the term all natural and that it's because
8 of that definition that the phrase all natural is on the
9 product, and what I am saying to you, your Honor, is that
10 my -- I believe my three witnesses will give different
11 answers to that question and they're answers that are
12 based on their personal view of what that term means, and
13 it may have absolutely nothing to do with why that phrase
14 is on the product.

15 THE COURT: Right. So then if I could try to
16 resolve this issue by rephrasing the interrogatory to say
17 what is the basis on which the defendant put this phrase
18 on this product.

19 MR. WOLFSON: Or your Honor, if it says does
20 your company have a definition of the term all natural
21 used on the label --

22 THE COURT: Well --

23 MR. WOLFSON: -- and if so, what is it?

24 THE COURT: Well, yes, but you told me there
25 isn't one and so what I am trying to get at is --

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1 MR. WOLFSON: No.

2 THE COURT: -- why is it --

3 MR. WOLFSON: No, your --

4 THE COURT: -- obviously, it's undisputed that
5 this label says all natural, so somebody had to decide to
6 put it there, and so the question can simply be limited
7 to how the heck did this phrase get on the label? It
8 says all natural, I'm looking at it right now, and so
9 someone put it there, and whoever put it there, if it's a
10 vice president of fruit snacks or whatever it is, or some
11 other person who said great, we can do that, had to have
12 a basis for it, and so that's the person -- that's the
13 person who should be asked, how did this label get on
14 there.

15 Now if it turns out, again, I am just making
16 things up as a hypothetical that no one made that
17 decision, that a marketing person said that would sound
18 really nice, let's put it there, then that's important to
19 know too but I think --

20 MR. WOLFSON: Well, but I want to make really
21 clear --

22 THE COURT: -- how it got there --

23 MR. WOLFSON: No, no, and I understand that.

24 THE COURT: -- is an important question, right?

25 MR. WOLFSON: No, I don't have a problem with

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1 that. I'm just saying I don't want you to misunderstand
2 anything I'm saying. What I am saying is two people may
3 have discussed putting that phrase on the label, and each
4 of those people or persons, may have a different
5 understanding about what all natural means, and I'm
6 simply suggesting that neither one of their definitions
7 of what that phrase they personally believe means, may
8 explain why it's on the box.

9 THE COURT: But somebody authorized it. It's
10 there. So if those people --

11 MR. WOLFSON: I don't -- I can't --

12 THE COURT: -- disagree --

13 MR. WOLFSON: -- (audio interference) dispute
14 that, Judge, yeah.

15 THE COURT: Yeah, so if those two people
16 disagree, that highlights to me why this is an important
17 question to pose not to those two individuals in a
18 deposition but in an interrogatory where your client can
19 explore the question how did this word get on there when
20 people disagree about it, and then you can have someone
21 say I'm the one, or someone can answer it, that the
22 decision was made because on the whole, this was the
23 reason, the analysis, even if there's disagreement.

24 So it doesn't have to be that everybody in the
25 company agrees, that's the whole point, but someone made

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1 the decision notwithstanding any disagreement, that this
2 is the -- these are the words that would be on this
3 product, so that's why it's an important and relevant
4 topic for an interrogatory, so that the company can
5 say --

6 MR. WOLFSON: That's a --

7 THE COURT: -- someone put it there, and this
8 is the reason why.

9 MR. WOLFSON: Judge, I am not quarreling with
10 anything you said.

11 THE COURT: Um-hum.

12 MR. WOLFSON: I'm simply responding to why this
13 interrogatory, as it was propounded, we thought was --

14 THE COURT: Yeah.

15 MR. WOLFSON: -- an objectionable
16 interrogatory.

17 THE COURT: Yes, yes. And I understand why it
18 may be a difficult interrogatory to answer but I think
19 it's relevant, so you should answer it.

20 MR. WOLFSON: That's also, Judge, why I just
21 suggested, if we're having these people at depositions
22 and we've agreed to produce them --

23 THE COURT: So I know --

24 MR. WOLFSON: -- why they can't be (audio
25 interference) --

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1 THE COURT: -- Mr. Wolfson, but what you've
2 already told me is that these people may disagree. So
3 when there's a disagreement, it still will not answer the
4 question as to why this product was labeled all natural.

5 MR. WOLFSON: Judge --

6 THE COURT: You need to have an answer for
7 that.

8 MR. WOLFSON: -- they may --

9 THE COURT: Somebody made the decision. You
10 need to --

11 MR. WOLFSON: Judge, (audio interference) --

12 THE COURT: -- to have an answer.

13 MR. WOLFSON: I will say this Judge --

14 THE COURT: I don't mean you, Mr. Wolfson, I
15 mean your client.

16 MR. WOLFSON: Yeah, I mean, I don't know what
17 each will say. I sure hope they don't disagree with each
18 other.

19 THE COURT: Well, then that's just the nature
20 of representing a corporation. You'll get it --

21 MR. WOLFSON: And (audio interference) --

22 THE COURT: -- figured out, and figure out what
23 the proper answer is.

24 MR. WOLFSON: Yeah, I just thought this --
25 again, we're talking with this particular interrogatory,

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1 why we objected, and I thought --

2 THE COURT: I know, I --

3 MR. WOLFSON: -- our objection was well-
4 founded, yeah.

5 THE COURT: I understand that you had a valid
6 objection and I have weighed the need and relevance of
7 the interrogatory, and -- as well as your objection and
8 on a whole, I think you should answer it because I think
9 it's relevant, and important.

10 MR. WOLFSON: Judge, should we answer it in
11 this -- as it's right here then.

12 THE COURT: The -- no, I think it should be
13 phrased in the more narrow way of how was all natural
14 defined was defined as it pertains to this product, not a
15 company-wide definition because it may be that there is a
16 disagreement across product lines as far as all natural
17 but all we're talking about is this product.

18 MR. WOLFSON: Okay, Judge, (audio
19 interference) --

20 THE COURT: If it turns out in -- again, in the
21 exploration of this issue, if it turns out that there's
22 relevant information that causes other products to become
23 relevant, you can revisit -- plaintiff can revisit it but
24 based on what I've heard now, the only relevant product
25 is this product.

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1 MR. WOLFSON: We understand your Honor --

2 THE COURT: All right. Mr. Francis, do you
3 understand --

4 MR. WOLFSON: -- thank you.

5 THE COURT: -- that --

6 MR. WOLFSON: Yes.

7 THE COURT: All right. And Mr. Francis, I have
8 rephrased your interrogatory and directed to --

9 MR. FRANCIS: Understood.

10 THE COURT: -- answer just that question.

11 MR. FRANCIS: Understood, your Honor.

12 THE COURT: All right. I believe that the last
13 interrogatory at issue is interrogatory 12 where we asked
14 for information in defendants' possession regarding the
15 identity of their consumers -- of this particular
16 product.

17 I will -- I think the important thing here is
18 not necessarily for them to provide that information,
19 although that is what the request asks for. I think it's
20 more important to disclose whether or not they have that
21 information and that is important to class certification
22 and specifically to ascertainability.

23 Again, we're anticipating a potential defense
24 wherein they tried to argue that the class is not
25 ascertainable because they do not sell directly to the

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1 consumer, they sell to retailers, and they don't have
2 access to the retailer records regarding to whom these
3 products were sold.

4 So that's really the information that we're
5 trying to get is do they have information and what
6 information do they have regarding the end purchasers of
7 this product.

8 THE COURT: And Mr. Wolfson, what's the
9 objection, that it's not relevant, or you don't possess
10 it?

11 MR. WOLFSON: Judge, what they're asking about
12 is Arizona has a website on which you can go -- a
13 consumer can go and buy certain products and they've
14 asked us to give them the names, address, telephone
15 numbers, and other contact information for anyone who
16 went on that website and purchased the product. And
17 we've objected to it because we think it's irrelevant if
18 at some time, we get to class certification, and they say
19 they need this information in order to give notice to the
20 class members, or if at that point, we say you can't
21 ascertain the class because we don't know who bought it
22 from us, all right, then I would understand its relevance
23 but they're asking us now to give them, you know,
24 confidential information that people might give us if
25 they purchase this product online; their name, their

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1 address, their telephone, their confidential information.

2 And what's the purpose at this point? At this
3 point, we're not at class certification, and when we get
4 there if, in fact, it becomes relevant again, we can
5 determine if we've got that information, and they get a
6 class certified, I assume we'll be ordered to give them
7 that information. I think it's not relevant at this
8 point though.

9 THE COURT: So can you read to me what exactly
10 interrogatory 12 says?

11 MR. WOLFSON: It says, "List the names,
12 addresses, telephone numbers, and other contact
13 information of all consumers that purchased the product
14 during the applicable time period."

15 THE COURT: Okay. So what I heard -- Mr.
16 Francis asks for or the relevance argument that Mr.
17 Francis was making, was asked to the ascertainability, so
18 it seems to me the only question to be asked at this
19 point is does the defendant have access to the
20 information of who purchased the product and if it's
21 limited to the website, you can say yes, limited to the
22 website. If you have other consumer information somehow,
23 you can identify the sources, and then as you said, Mr.
24 Wilson, not provide the details until later, but being
25 able to identify the sources would be enough for the

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1 plaintiff to make an ascertainability argument for class
2 certification purposes, okay?

3 So it seems to me asking for whether the
4 defendant has the sources, and what types of lists they
5 may have access to would be enough to provide to a court,
6 as far as whether the class is ascertainable, if a class
7 is certified, then as Mr. Wolfson stated, then the
8 details can be turned over.

9 But at this point, all you will need to know is
10 what are the potential sources, you've talked about the
11 website, if there are others that might be a fruitful
12 exercise to list where those things are, if they were
13 rebate programs or other promotional things where you
14 have access, that might be the way to go. All right?

15 MR. WOLFSON: Yes, your Honor.

16 THE COURT: Is that clear, Mr. Francis?

17 MR. FRANCIS: Yes, your Honor.

18 THE COURT: And Mr. Wolfson, please provide
19 that. All right.

20 MR. WOLFSON: Yes, your Honor.

21 THE COURT: All right. So I think that takes
22 care of all the deficiencies that plaintiff has
23 ascertained. Now let's turn to defendants. So Mr.
24 Wolfson, you've said that you have not gotten anything
25 from the plaintiff that you asked for?

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1 MR. WOLFSON: No, your Honor. We haven't
2 received anything, and I want to say that that includes
3 the most basic requests that they obviously knew we would
4 make, which is there's this very vague allegation that
5 the plaintiff purchased this product during some month,
6 and then in an interrogatory answer, they told us he
7 purchased it on Amazon.

8 We've asked for the date, what he purchased,
9 what he paid, and most importantly, the receipt or other
10 proof that he actually made a purchase of this product.

11 THE COURT: All right. So let me just ask
12 of --

13 MR. WOLFSON: And all we've received -- I'm
14 sorry. Go ahead, your Honor.

15 THE COURT: That's fine. Let me just find out
16 from Mr. Francis, when did your client purchase this
17 product and was it online or was it in person?

18 MR. FRANCIS: It was online, as alleged in the
19 complaint. I believe we provided the month of October
20 2000- -- I don't know --

21 THE COURT: Right, but --

22 MR. FRANCIS: -- but it was 2019.

23 THE COURT: Let me look at the complaint.

24 MR. FRANCIS: Sure, yeah, tell me when --

25 THE COURT: You said online, was it through

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1 Amazon?

2 MR. FRANCIS: Yes, and that's --

3 THE COURT: Okay. Amazon has very good
4 records. Why can't you go through -- why can't your
5 client go back and get his order?

6 MR. FRANCIS: He has been doing so, your Honor,
7 and to the extent that he can --

8 THE COURT: It's very simple.

9 MR. FRANCIS: I understand.

10 THE COURT: It's very simple.

11 MR. FRANCIS: We --

12 THE COURT: That's the beauty of Amazon.

13 MR. FRANCIS: We have not objected to producing
14 those documents --

15 THE COURT: No, but you need to produce them.

16 MR. FRANCIS: -- if he was able to locate them.

17 THE COURT: Why can't he (audio interference)?

18 MR. FRANCIS: I understand but -- because -- I
19 don't know why he wouldn't be able to locate them. I
20 can't honestly --

21 THE COURT: Well --

22 MR. FRANCIS: -- answer that question.

23 THE COURT: Yeah, so please --

24 MR. FRANCIS: But we tried to agree --

25 THE COURT: I (audio interference) I am a

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1 consumer that on Amazon, it is extremely simple, so there
2 should be no reason in the world. You can't even erase
3 it. It's there. Right?

4 MR. FRANCIS: Understood, your Honor.

5 THE COURT: So you need to (audio
6 interference) --

7 MR. FRANCIS: And --

8 THE COURT: -- make this immediately.

9 MR. FRANCIS: We've not objected to producing
10 that. We had --

11 THE COURT: Well, why hasn't --

12 MR. FRANCIS: There are, in fact, several
13 categories here -- because we've tried to --

14 THE COURT: Why hasn't it been produced?

15 MR. FRANCIS: Because we've tried to agree on a
16 date for mutual production with the defendants with
17 regard to these documents, and you know, there are also
18 documents, they're noted in the letter, several
19 categories of documents that they have agreed to produce
20 that we've not seen at this point.

21 THE COURT: But you can't -- no, no, no, no,
22 no. You cannot hold up your production as a bargaining
23 chip for the other side's production. You filed your
24 amended complaint May 19th. We are now in December. Not
25 to turn over basic information like when the product was

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1 purchased, and through what means, and how much he paid
2 for it, is so basic, that should have been turned over in
3 the initial disclosures. So you need to turn that over
4 immediately.

5 All right. Mr. Wolfson --

6 MR. FRANCIS: Understood, your Honor.

7 THE COURT: -- what else?

8 MR. WOLFSON: Well, your Honor, just -- I'm
9 going to follow our letter because I listed the
10 interrogatories and document requests by number, that
11 addresses number 2 and number 11, which where we asked
12 for the price, the date of purchase.

13 We also asked in number 2 for the plaintiff's
14 computation of his alleged damages which again, we're not
15 asking for the classes damages, we're asking Mr. Silva
16 says I've paid X for this product but I could have bought
17 an unspecified comparable product that didn't say all
18 natural (indiscernible).

19 So we've asked him what product are you
20 referring to? Tell us so we see what your damage theory
21 is. It may turn out that this so-called comparable
22 product costs more.

23 THE COURT: So can I just take a step back from
24 this? What I heard Mr. Francis say earlier was that they
25 are not actually objecting to turning over this

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1 information or answering the interrogatory. They're
2 trying to figure out a time to do that.

3 MR. WOLFSON: That's the --

4 THE COURT: Is that (audio interference), Mr.
5 Francis? And if that's the case, let's just figure out a
6 time and then you'll turn over all the information,
7 right?

8 MR. FRANCIS: Well, that's with regard to the
9 -- any receipt, computer records of the purchase which
10 would obviously include information about the date of the
11 purchase, the price of the purchase. I think what
12 defense counsel is asking about now is that the complaint
13 alleges that the damage is a price premium, that he paid
14 -- that the plaintiff paid more for this product than he
15 otherwise would have, had the all natural representation
16 not been on the label, and they've asked in a couple of
17 interrogatories and document requests for information
18 specifically about well, what is the price premium, how
19 much more did he pay, and what product would he have
20 otherwise purchased? What is a comparable product? And
21 our response to that is that that's a misunderstanding of
22 the damages theory here. It's not about any specific
23 comparable product. It is about a hypothetical Arizona
24 gummy chews product that did not have the labeling of all
25 natural on it.

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1 THE COURT: Right. And how much would he have
2 paid for --

3 MR. FRANCIS: So I think that's where we're at
4 a disconnect here.

5 THE COURT: How much would he have paid for
6 that hypothetical product?

7 MR. FRANCIS: I don't think that's a question
8 that he can calculate at this point.

9 THE COURT: But then how do you calculate
10 damages?

11 MR. FRANCIS: We calculate damages based on a
12 class-wide basis. You can do it through --

13 THE COURT: Well --

14 MR. FRANCIS: -- survey --

15 THE COURT: -- but you do it --

16 MR. FRANCIS: -- a content analysis --

17 THE COURT: -- hold on. Wait, hold on a
18 second.

19 MR. FRANCIS: Sure.

20 THE COURT: The class-wide basis would be to --
21 you would take one person and then you could extrapolate
22 but if the one person can't even put a number on it, he's
23 sort of consumer number one, or consumer zero, let's say,
24 for your survey. So why can't he answer that question?

25 MR. FRANCIS: I mean, he could probably answer

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1 that question with a range.

2 THE COURT: All right. Well, then answer the
3 question with a range.

4 MR. FRANCIS: That's fine, your Honor.

5 THE COURT: All right. Let's move on.

6 MR. WOLFSON: We --

7 THE COURT: We're running out of time. I've
8 got another conference coming up, so can you please try
9 to group your arguments, so we can get through as much as
10 possible (audio interference).

11 MR. WOLFSON: Yes, your Honor. Let me just ask
12 quickly to that one issue. Again, the complaint alleges
13 that there are comparable products that cost less than he
14 could've purchased. If counsel is now saying that that
15 was just a hypothetical, that that was just a
16 hypothetical, then I don't know how you file a complaint
17 that says that I purchased a product and paid more
18 because it said all natural when the plaintiff at the
19 time he filed, didn't even know what the price was of
20 this alleged comparable product. So --

21 THE COURT: All right.

22 MR. WOLFSON: -- this is one that (audio
23 interference) --

24 THE COURT: Mr. Wolfson, you can ask the
25 question. I'm sure you can ask the question or rephrase

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1 the question in a way that gets you that answer, all
2 right?

3 MR. WOLFSON: Okay.

4 THE COURT: So if the question is is there a
5 comparable product, and if Mr. Francis answers
6 consistently with what he said today, no, then you can
7 follow-up with what is the range, which I think Mr. -- a
8 price that he would've paid and Mr. Francis has said he
9 can answer that question.

10 So please parse it out if you want to rephrase
11 the question so that it addresses what you now understand
12 Mr. Francis to be saying.

13 MR. WOLFSON: Okay. Judge, we've also asked
14 for his employment history. I think it's relevant what
15 his prior employment and experience is to his adequacy as
16 a class representative, as well as to his -- whether he
17 was really misled because we understand that some of his
18 prior employment, he may have actually worked in the
19 industry as a creative designer on products that were
20 labeled by clients he worked for as natural.

21 THE COURT: All right.

22 MR. WOLFSON: He's refused to --

23 THE COURT: So --

24 MR. WOLFSON: -- disclose his --

25 THE COURT: Okay. Sorry to interrupt you. So

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1 what I hear you saying is that the issue of his prior
2 employment is important to figure out if he -- his level
3 of sophistication in terms of understanding the product
4 label all natural, is that right?

5 MR. WOLFSON: Correct.

6 THE COURT: Okay.

7 MR. WOLFSON: Correct.

8 THE COURT: So why is that not relevant, Mr.
9 Francis?

10 MR. FRANCIS: Well, it is relevant except that
11 they've asked for his entire employment history. They've
12 also subpoenaed his current employer, and the danger here
13 is that they're going -- they're essentially going to use
14 this to subpoena and harass his former employers, when
15 what they should be doing is simply asking in
16 interrogatory, narrowly-tailored interrogatory, as to
17 whether he has done work on campaigns that feature the
18 terms natural or all natural. And that answers their
19 question and is directly relevant to what they're trying
20 to get at.

21 THE COURT: Okay. So you should turn over your
22 client's employment history, and if there's any harassing
23 action, you can bring it to the Court's attention, and
24 tell me why it's harassing, all right? Let's move on.

25 MR. WOLFSON: Your Honor, the next issue and

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1 this is really the central issue for us in this case, is
2 Mr. Silva previous brought another purported class action
3 against Smucker's, claiming he was misled there to
4 purchase a product because he didn't understand what
5 natural meant, and this was several years ago.

6 He was represented in that case by Joseph
7 Lipari, who is his counsel in this case. Mr. Lipari is
8 his brother-in-law. Mr. Lipari also represents Mr.
9 Silva's girlfriend in yet another consumer class action.

10 We believe, and Judge Ross just sustained our
11 affirmative defense which is the letter I sent to you, we
12 believe that at the time that Mr. Silva purchased this
13 product, he purchased it for the purpose of asserting
14 this lawsuit and not because he was misled. And we've
15 asked for the communications that he had prior to this
16 lawsuit being filed with Mr. Silva and other third
17 parties about whether to go and purchase this product.

18 We can (audio interference) --

19 THE COURT: Wait, I'm sorry. Communications
20 between? I'm sorry, you said between Mr. Silva and whom?

21 MR. WOLFSON: And Mr. Lipari, as well as --

22 THE COURT: Lipari.

23 MR. WOLFSON: -- any other third parties, for
24 example, he might've had a communication with his -- Mr.
25 Silva might have had a communication with his wife, who

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1 is Mr. Lipari's sister, where it was discussed that he
2 should go and purchase this product online, so that they
3 could file this lawsuit.

4 THE COURT: All right. So the request for
5 document -- tell me the number?

6 MR. WOLFSON: It's --

7 THE COURT: 13.

8 MR. WOLFSON: -- number 3, number 3, number 13,
9 and number 36, the document requests.

10 THE COURT: Okay.

11 MR. WOLFSON: And 37 --

12 THE COURT: Right.

13 MR. WOLFSON: -- which is whether he had any
14 similar conversations or communications with any other
15 law firm.

16 THE COURT: Right. Okay. So Mr. Francis?

17 MR. FRANCIS: Your Honor, I think ultimately,
18 we can answer those questions because the answer is going
19 -- is simply going to be none. So I think --

20 THE COURT: All right.

21 MR. FRANCIS: And I think that that's something
22 that we -- there are several of these document requests
23 that are raised in the letter that were the subject of
24 meet and confers prior to this, that I believed we had
25 already agreed to supplement our responses to indicate

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1 that no such documents existed, and that would include
2 these requests.

3 THE COURT: Okay. So then let me -- I heard
4 the parties in the next conference -- the 3:30 conference
5 join the line, so please be patient as I finish up this
6 conference.

7 So in the interest of trying to be efficient
8 here, Mr. Francis, are there interrogatories remaining to
9 which you are not supplementing, to which you maintain
10 your objection, so that we can discuss what your
11 objections are?

12 MR. WOLFSON: As to --

13 MR. FRANCIS: I don't --

14 MR. WOLFSON: -- (audio interference) document
15 request two --

16 MR. FRANCIS: Go ahead.

17 MR. WOLFSON: I'm sorry, I didn't mean to --
18 but document request two, because there's only three
19 interrogatories that were at issue, there were more
20 document requests.

21 THE COURT: Okay. I didn't mean to limit it to
22 interrogatories, but I meant all the requests.

23 MR. WOLFSON: Okay. I'm sorry, your Honor.

24 MR. FRANCIS: No, your Honor, I don't actually
25 believe there are.

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1 THE COURT: So you'll be supplementing all the
2 remaining document requests?

3 MR. FRANCIS: I believe that's correct,
4 including -- I think they have asked for -- I want to
5 cabin that a little bit. There are requests they have
6 made that would include -- for example, they have made
7 requests regarding documents related to the prior action
8 in which our firm represented Mr. Silva.

9 We will produce those documents that are in Mr.
10 Silva's possession, to the extent that they're not
11 privileged communications, and I think that goes for the
12 -- some of the other communications that we've agreed to
13 produce as well.

14 THE COURT: All right.

15 MR. FRANCIS: I understand that the defense
16 counsel is asking for things prior to the engagement as
17 counsel, and that's fine, but after he was -- after we
18 were retained, I think, we're going to object to those on
19 privilege grounds.

20 THE COURT: So Mr. Francis --

21 MR. WOLFSON: Right, but let me just --

22 THE COURT: -- for every -- wait, hold on. So
23 Mr. Francis, if you're saying that there are privileged
24 documents, you need to create a privilege log, all right?
25 And if there are other objections that you're interposing

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1 -- actually, so you need a privilege log number one.
2 Number two, it's not just possession, it's possession,
3 custody or control --

4 MR. FRANCIS: Yes.

5 THE COURT: -- of anything that is still within
6 the control of your client is subject to this request.

7 Mr. Wolfson, you started to say something?

8 MR. WOLFSON: Yes, your Honor. There's just
9 one -- there's one distinction that's very important.
10 We've asked for materials that he received in the
11 Smucker's action after he started the action because
12 these materials will show, we believe, the education that
13 he received in that action, about what is, and what is
14 not an actual product.

15 And so the materials that he received, whether
16 they were articles, pleadings, potential expert
17 materials, but all discussions that he was having about
18 what is or isn't a natural product goes to the heart
19 again of this defense that this is not a consumer that
20 could have been misled to buy this product. This is a --
21 as Judge Ross said, a unique set of facts where someone
22 who says, you know -- it's like the old saying, fool me
23 once, you know, good for you. We don't think he could've
24 been fooled, that he received an education but I need the
25 documents that he received that show the education,

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1 otherwise what I can cross-examine him with?

2 THE COURT: Yes, and so I hear the -- Mr.
3 Francis say that he will go through the materials, and I
4 have told him that if he's withholding anything based on
5 privilege, he needs to make a privilege log, so we know
6 exactly what's being withheld, and then we can go -- if
7 there's a dispute on that, we can go through each of the
8 items to see whether they are, in fact, privileged or
9 not, and whether they go to this issue that you're
10 talking about, receiving the education, as opposed to
11 receiving legal advice.

12 MS. POLLACK: Your Honor, can I ask --

13 MR. WOLFSON: Thank you, your Honor.

14 MS. POLLACK: I'm sorry, this is Gayle Pollack.

15 THE COURT: Yes, Ms. Pollack.

16 MS. POLLACK: May I ask one further
17 clarification and I apologize, I know you're (audio
18 interference).

19 THE COURT: No, no problem.

20 MS. POLLACK: Mr. Francis was very clear that
21 he will produce documents in Mr. Silva's possession. You
22 know, I am wondering if that should be clarified to
23 include documents, you know, nonprivileged documents in
24 his counsel's possession that might have been provided
25 because for example, I can easily see -- Mr. Silva having

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1 received documents in 2016, when he filed the Silva case,
2 not maintaining copies of those documents obviously, but
3 his attorney would certainly have possession of the
4 discovery from the Smucker's case.

5 So I just wasn't sure whether Mr. Silva --
6 whether Mr. Francis was trying to be very clear that he
7 was only producing documents, you know, from Mr. Silva --

8 THE COURT: Yes.

9 MS. POLLACK: -- as opposed to his law firm.
10 Thank you.

11 THE COURT: Yes, and that's a good point, Ms.
12 Pollack, which is why I clarified by saying "custody or
13 control" because they would still be within his control,
14 even though his counsel has them. So that's how I would
15 be interpreting that, that those are documents that are
16 part of Mr. Silva's file. So even though his client --
17 his lawyer has the documents currently, they're still --
18 they still can be seen as Mr. Silva's documents.

19 MS. POLLACK: Thank you, your Honor.

20 THE COURT: So that was a good point, Ms.
21 Pollack.

22 Mr. Francis, understood?

23 MR. FRANCIS: Understood.

24 THE COURT: All right. And Mr. Wolfson, I
25 don't want to rush you in a way that we don't get to

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1 everything you need. Is there anything else that we
2 haven't touched on that you need to bring up now?

3 MR. WOLFSON: No, Judge, and I understand
4 you're already over the time limit and so thank you very
5 much for your time today.

6 THE COURT: All right. So I have been taking
7 notes but I think the parties have also been taking
8 notes, so you should be clear on what should be produced
9 and how. I think there was a request for a time frame.
10 So why don't we say -- well, Mr. Wolfson, why don't I ask
11 you, when do you think you'll be able to produce the
12 requested documents and interrogatory responses, the ones
13 that should be produced?

14 MR. WOLFSON: Judge, just because we're heading
15 into the holidays, and also the unique circumstances
16 where it's so difficult right at the moment to have
17 clients find things because they're in and out of the
18 office, I guess I would like to have till the first week
19 in January.

20 THE COURT: Okay. January 8th?

21 MR. WOLFSON: Yes, that would be great. Thank
22 you.

23 THE COURT: And is that a good date for you, as
24 well, Mr. Francis?

25 MR. FRANCIS: That's fine, your Honor. Thank

1 you.

2 THE COURT: Okay. So January 8th for both
3 sides to produce the documents and interrogatory
4 responses that I've compelled, and any supplements that
5 you've promised. Okay. Thank you, everybody.

6 If there are other issues that need to be
7 raised, please put them in another filing and we'll get
8 to it. I do apologize that I didn't allot enough time to
9 perhaps fully and in great depth, go through all of your
10 concerns, so if there's anything confer and see if they
11 need my attention and I will invite you to file a
12 supplemental request if we've missed anything.

13 MR. WOLFSON: Thank you, Judge.

14 THE COURT: All right. Thank you, everybody.

15 MS. POLLACK: Thank you.

16 THE COURT: Stay safe. I'm going to turn off
17 this recording and then we'll get back on the record for
18 the next case.

19 (Matter Concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **5th** day of **January** 2021.


Linda Ferrara

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